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IN THE

Supreme Court of the United States

71-250

October Term, 1971

BARTON BAKER, an attorney,
Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1971

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MONROE COUNTY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Barton Baker, an attorney of Rochester, N. Y., prays that a writ of certiorari issue to review the final order of the Court of Appeals of the State of New York, entered on May 26, 1971, which in a disciplinary proceeding, affirmed a lower (Appellate Division of the Supreme Court, Fourth Department) order which directed that petitioner be suspended from the practice of law for a period of six months

The suspension order has been stayed by a Judge of the New York Court of Appeals.

Opinions Below

The final order of the Court of Appeals affirmed with a brief memorandum opinion an Appellate Division order filed on June 30, 1970 which had confirmed a referee's report. A copy of the Court of Appeals opinion and order is attached to this petition as Appendix C. A copy of the Appellate Division opinion is attached as Appendix B. A copy of the referee's report is attached as Appendix A. The Court of Appeals opinion—order contains a statement that a free speech question under the First and Fourteenth Amendments was raised and necessarily passed on in that Court.

Jurisdiction

The order of the Court of Appeals was dated and entered on May 26, 1971. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1257(3).

Question Presented

Whether the Appellate Division's decision as affirmed by the Court of Appeals was a denial of petitioner's right of free speech under the First and Fourteenth Amendments to the United States Constitution.

Constitutional Provisions

The First and Fourteenth Amendments to the United States Constitution provide in pertinent part as follows:

> "Congress shall make no law *** abridging the freedom of speech ***."
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

In April, 1968 respondent Monroe County Bar Association pursuant to Section 90 of the New York State Judiciary Law, brought this proceeding in the Appellate Division, Fourth Department, of the New York State Supreme Court, for an order to impose disciplinary penalties on petitioner on allegations that petitioner had been guilty of improper conduct and violations of professional ethics as an attorney in maliciously making false accusations against and impugning the character of a probate judge (Surrogate) of Monroe County, New York and a firm of attorneys practicing in that county. Petitioner filed his answer denying that he had made any false accusations or made any accusations maliciously, and asserting his constitutional immunity, as a citizen, from punishment for exercising his right of free speech on public questions. The Appellate Division made an order appointing a County Judge as referee to report the facts. The referee made the report hereto appended (Appendix A) which in effect held that petitioner was guilty of unprofessional conduct: in maliciously making false statements about the Monroe County Surrogate, and the attorneys, with intent to harm and vilify them.

After argument, the Appellate Division confirmed the referee's report in an opinion (Appendix B) which is officially reported at 34 A. D. 2d 229 (unofficially reported at 311 N. Y. Supp. 2d 70).

Petitioner appealed to the New York Court of Appeals which affirmed the order below with a brief memorandum opinion (Appendix C) which is officially reported at 28 N. Y. 2d 977. The Appellate Division found that petitioner's statements were false and maliciously made, although it is clear and undisputed on the record that they were no more

than his honest statements of opinion as to actual occurrences in a court proceeding in which he was a party, as well as acting as his own attorney therein.

We briefly summarize the facts which are undisputed except for the Appellate Division's unfounded characterizations. Petitioner was an attorney of excellent professional reputation who has practised at Rochester, N. Y. for fifty years.

The facts are really undisputed except that respondent asserts—and we deny—that there is proof in this record that appellant's utterances were made with "malice" (that is, knowingly false) as that term is defined in Times v. Sullivan, 376 U. S. 254, and the other cases cited herein. Not only is there no proof of such "malice" but the complainant made no effort to prove it. Petitioner was the executor of, and one beneficiary under, the will of his late uncle. Petitioner administered the estate and drew, filed and served an account which showed a balance on hand in the estate of about $113,000 or about $7500 per each one-fifteenth interest. Most of the beneficiaries signed releases and each received his $7500. Tax returns previously filed by petitioner in the Surrogate's Court showed ante-mortem transfers by the uncle to petitioner of 1000 shares of stock valued at $104,000 at the time of transfer and a bank account of about $40,000. Beneficiaries entitled to 4/15 of the estate filed objections with Surrogate's Court of Monroe County, asserting that these transfers to petitioner had not been made or were void and that these assets were part of the estate to be accounted for. Petitioner has always sworn that the transfers were in all respects valid. The objectors were represented by various lawyers, including the Rochester firm of Goldstein, Goldman, Kessler and Underberg. The objections came to trial before the Surrogate but the

issue was never decided. The Surrogate never did decide the case but in various ways pressed for a settlement. Petitioner had acted as his own lawyer at the Surrogate's hearings but when settlement was urged on him, he retained successively two Rochester lawyers who recommended that he make a settlement and he agreed to pay $75,000 in compromise.

When it came time to complete the settlement, however, he was told that he must pay not only the $75,000 but $46,000 *additional* as attorney's fees of the lawyers for objectants. Reluctantly (because the Surrogate had, as everyone admits, intimated that he was going to surcharge petitioner $300,000) petitioner paid $121,000.

Although the objectants were entitled to no more than 1/15 of any recovery in settlement, the entire $121,000 went to them and their lawyers with nothing going into the estate or to the other beneficiaries so that, starting out with objections which would if sustained have netted each contestant about $11,000 or $44,000 in all, in fact the four contestants and their lawyers collected $121,000 so that each contestant received far more than any possible share if their objection had been sustained, besides each of course receiving his $7500 share of the balance shown on the account.

Although the disputed transfers did not amount to more than $160,000 at most (of which petitioner was entitled to one-fifteenth) the Surrogate announced when urging settlement that "upwards of three hundred thousand dollars" was involved. The Surrogate had gotten this wildly exaggerated figure from an extraordinary and mysterious document which was filed with the Surrogate under the name of the Goldstein Goldman firm.

Is it surprising that petitioner, an honest, reputable, elderly lawyer, felt that he had been mistreated?

It is undisputed that the statements because of which petitioner is being punished never got any public attention whatever. One was made to a Monroe County Bar Association Committee meeting (4 or 5 persons present) at a hearing to which appellant as an Association member had been invited. The other allegedly derogatory statements were in documents filed by petitioner in the Monroe County Clerk's office after the Surrogate's Clerk had refused to file them. Why were these filed? Petitioner's testimony is undisputed that he filed these papers because, by reason of the unusual settlement procedure on the objections, there was no final accounting on file anywhere. Petitioner was trying to (he apparently succeeded) use these settlement amounts as income tax deductions.

What did petitioner write and say in the allegedly derogatory utterances which are the sole basis for this proceeding? Fairly summarized, petitioner's statements were as follows:

1. That the Surrogate exercised undue and unfair pressure on petitioner to compromise the objections to the accounting and that the Surrogate's Court was guilty of many abuses.

2. That the objections filed by the attorneys who instigated the present proceeding were unfounded and without any merit.

Statements in litigations that claims, etc. are unfounded are common if not universal. If every litigating lawyer who has told a Court that his adversary's claim was unfounded would be subjected to professional discipline,

the whole bar would be under discipline. Such a ground for punishment is absurd. Let us remember that these lawyers who feel so aggrieved by charges that their clients' objections were unfounded, apparently thought it entirely proper to charge petitioner with most serious misconduct as to the transfers to him from his uncle.

As to petitioner's accusations against Surrogate's Courts, it is undisputable and a matter for judicial notice that the nation's greatest newspapers, leading magazines and prominent citizens including leading New York State judges had, on the floor of the New York Constitutional Convention and elsewhere, made similar charges on scores of occasions. Is appellant alone forbidden to make such assertions? His reliance on these utterances by reliable persons and publications in itself refuted any contention of "reckless disregard" of the truth. This Court has emphatically restated the Times v. Sullivan definition of "malice" and held it to be an "error of constitutional magnitude" in such cases as this to apply the other or conventional definition of "malice" as being merely "spite, hostility or deliberate intention to harm" (Greenbelt Coop. Pub. Assn. v. Brasler, 398 U. S. 6).

As to petitioner's accusation that the Surrogate had unfairly pressured him into a settlement, this was simply petitioner's opinion, correct or not, but based on facts. When the trial of the objections had ended, the Surrogate actively urged a settlement and intimated that appellant would be surcharged $300,000 or more, and later at least tacitly approved the payment to the objectants including their attorney's fees, of an amount several times greater than they were entitled to on any possible theory. Is this not a case where, even if petitioner's conclusions were ill-advised, he was entitled to voice his opinion as fair comment on the facts?

There simply is no proof of any kind whatever (much less proof with the "convincing clarity" required by the cases) that petitioner made these statements knowing their falsity of disregarding truth or falsity. He swore that he thought, and still thinks, that he was doing a public service to point out abuses. There is nothing to indicate that he had any other purpose. His statement as to his reasons was nowhere impeached. Risking repetition, we point out as to the special meaning of "malice" in this connection that "false" means "calculated falsehood", and "reckless disregard" means just what it says (Garrison v. Louisiana, 379 U. S. 64, 75).

We do not condone petitioner's language or insist that his conclusions were correct. We say with earnestness that he is protected by his constitutional right as hereinafter argued, and that on the undisputed proof, no one suffered any harm or obloquy.

We cite this Court's statements that public policy and constitutional freedoms require that debate on public issues be uninhibited, robust and wide-open (Times v. Sullivan, 376 U. S. at page 270). Petitioner's statements were comparatively mild.

Reasons for Granting the Writ

Petitioner's statements were privileged and immune from punishment under the Federal Constitution and the many relevant decisions of this Court.

It is the settled law that under the Constitution a citizen cannot be held in damages or otherwise punished for defaming a person who is in a public or quasi-public position unless the complained-of statement was made with malice—that is, with knowing falsity or with reckless disregard of whether false or not (N. Y. Times v. Sullivan,

376 U. S. 254, 279-280; Garrison v. Louisiana, 379 U. S. 64; Beckley v. Hanks, 389 U. S. 81; Pickering v. Board, 391 U. S. 563; Puentes v. Board, 392 U. S. 1341 reversing 18 N. Y. 2d 906, see 24 N. Y. 2d 996). These cases hold that the person claiming to have been defamed has the burden of proof, that the rule applies to disciplinary proceedings, that an important consideration is as to whether the statements had any damaging or disruptive effects, that the proof of malice must be of convincing clarity, that the privilege exists even though the statements were made from a bad motive or desire to injure, and that the constitutional freedoms require that debate on public issues should be uninhibited and robust, including sharp attacks on public men.

It should need no argument that it is particularly important that lawyers, traditionally public spokesmen, should be free to speak their minds.

It is no answer here that the Appellate Division made a finding of "malice". Not only is there no scintilla of proof that petitioner knew these charges were "false" but there is nothing to show that they were in any way false. They were a citizen-lawyer's opinions and comments on court proceedings.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES S. DESMOND,
Attorney for Petitioner.

August 15, 1971.

APPENDIX A

Referee's Report

STATE OF NEW YORK

SUPREME COURT

APPELLATE DIVISION—FOURTH JUDICIAL DEPARTMENT

In the Matter
of
BARTON BAKER, an Attorney admitted to the Bar September 27, 1923, at a Term of the Appellate Division of the Supreme Court of the State of New York, Fourth Department.

Pursuant to order of the Appellate Division entered September 24, 1968, a hearing on the above matter was held on August 24, 1968, a hearing on the above matter was held on August 18th and 19th, 1969. In accordance with the directions there contained, we herewith report the following as our Findings of Fact and Law with recommendations as to whether the charges should be sustained or dismissed.

Respondent was admitted to the New York State Bar in 1923 and practiced law continuously in Rochester since that time.

On March 17th, 1964, respondent's uncle, Henry A. Baker, then in his nineties, died in Rochester, leaving a will which designated respondent as executor and named nieces and nephews including respondent as legatees. The decedent had lived in St. Louis a number of years, but became incapable of caring for himself and moved to a

nursing home in Rochester approximately two years prior to his death. The will was drawn by the respondent after the uncle had moved to Rochester and while the respondent was assisting in the administration of his financial affairs.

The will was duly probated in the Surrogate's Court of Monroe County, letters testamentary were issued, and the respondent commenced administration of the estate. Prior to the filing of an account by respondent, a representative of a firm of attorneys in the New York City area sought to retain the Rochester firm of Goldstein, Goldman, Kessler and Underberg (hereafter referred to as the Goldstein firm) on behalf of one of the legatees. After an initial conference with the respondent as to the status of the estate and an examination of the file in the Surrogate's Court, the Goldstein firm accepted the retainer and filed a petition for a compulsory accounting. An account was then filed by respondent as Executor of the Henry A. Baker Estate listing assets of approximately $113,000.00 for distribution but it did not include a bank account of approximately $38,000.00 and a thousand shares of common stock of the Eastman Kodak Company (valued at approximately $104,000.00 at the time of the alleged gift, but since increased in value) which had been designated by respondent in the estate tax return as gifts made to the respondent by Henry A. Baker prior to his death. Objection to the account was filed by the Goldstein firm and by other counsel in the Rochester vicinity representing six objectants whose collective interests comprised four of the fifteen shares. The objections laid particular emphasis on the gifts alleged to have been made to respondent by the decedent at an advanced age approximately two years prior to his death.

Trial of the issue raised by these objections was had before Monroe County Surrogate Michael L. Rogers and extensive evidence was heard relating to (a) whether, prior to his death, the decedent knowingly transferred the monies and stocks to the respondent absolutely; and (b) whether the estate was properly administered by the respondent in accordance with his fiduciary obligations. At the close of the evidence in that proceeding Surrogate Rogers stated:

> "I would like to make this suggestion to Counsel. I would like to sit down and talk to Counsel some day next week for the sole purpose of talking compromise.
>
> I will not compel any attorney to do so if the attorney does not wish to do so.
>
> The way I view this matter right now, as I size it up, there is upwards of three hundred thousand dollars. It would appear to me that any litigant who lost before me would definitely follow this to a higher court.
>
> I, also order the Reporter do not start the transcribing of this testimony until a week from tomorrow.
>
> If Counsel wish to come into my Chambers some afternoon next week I will be glad to discuss with all of them."

Respondent had not been represented by other counsel in the trial of the issues in the Surrogate's Court. However, after initial settlement negotiations were unsuccessful he retained counsel who conferred with the Surrogate and undertook settlement negotiations with the various attorneys for the objectants. After a number of meetings and conferences between counsel a Memorandum of Settlement was executed (Exhibit 13) with the knowledge and consent of the Surrogate.

The will of Henry A. Baker had divided the estate into fifteen shares, one for each of decedent's nieces and nephews. Under the account initially filed by respondent, each share amounted to approximately $7,500.00, and the respondent had obtained releases from a number of the legatees approving distribution in that amount. In the final settlement, the objectants to the account, representing four shares, received about $74,000.00 from respondent's personal account, and their attorneys received approximately $46,000. The settlement memorandum agreed that the estate would be settled upon the filing of releases after withdrawal of the account and objections with permission of the Surrogate. In fact, however, after the objections were withdrawn in keeping with the settlement agreement, the account was accepted and approved.

We have noted that respondent was represented by counsel in the settlement negotiations. Review of the evidence before the Surrogate (Exhibit 7-a) emphatically supports the apparent conclusion of respondent's counsel as well as that stated by the Surrogate in the course of the present proceeding that "the objections were sound" and if not otherwise compromised would have required a finding in favor of the objectants (p. 167). The record in the Surrogate's Court permits only of the conclusions that the objections to the account were based upon sound and substantial evidence obtained through a lengthy and painstaking investigation of the acts undertaken and presented primarily by representatives of the Goldstein firm. We conclude from a review of that record that settlement of the issues in the manner finally agreed upon was premised upon an objective judgment of the facts and legal probabilities by respondent's counsel and was to his best interests under the circumstances.

An adverse decision in the Surrogate's Court would necessarily have been premised upon a finding of fact that the respondent had violated a fiduciary duty he owed to the decedent and/or the legatees of the estate and, as attorney for the estate as well as its executor, such finding would publicly bring in question the respondent's professional ethics (See Canon 11, Canons of Professional Ethics). In withholding a final decision at the request of counsel for the parties to permit them to exhaust settlement possibilities, it is apparent that the Surrogate gave fair and reasonable consideration to the respondent under the existing circumstances. It is also apparent that the Surrogate did not exert undue influence on the parties to attain a settlement, and that he was prepared to make an adjudication of the issues on the merits if voluntary settlement was not had.

After settlement had been completed, respondent commenced to prepare and publicly file a number of documents and statements concerning the judicial conduct of the Surrogate of Monroe County and the professional conduct of the Goldstein firm. On the trial of the present proceeding, the respondent gave as his reasons for filing such statements (a) that the payment of funds by him in settlement of the objections and his reasons for doing so should be publicly recorded for purposes of obtaining personal tax deductions for the funds paid by him in settlement; that the Clerk of the Surrogate's Court would not accept the documents and statements of settlement as a result of which he filed them in the form of a deed in the Monroe County Clerk's Office (pp. 269,270); and (b) that there was throughout the period of time 1965-1967 public debate and discussion both within the State of New York and nationally, concerning possible revision of the manner and

method of the administration of decedent's estate and in particular relating to reform of the Surrogate's Courts in the State of New York; that the respondent by his allegations was participating in such public debate of these issues as was his right under the First Amendment of the United States Constitution.

Detailed review of the documents and statements in light of the proceedings in the Henry A. Baker Estate is not necessary here to reject such arguments. Voluminous documents and affidavits of respondent were filed and recorded in the Monroe County Clerk's Office (Ex. 1, recorded Sept. 26, 1966, comprising 18 pages; Ex. 2, recorded Dec. 5, 1966, comprising 53 pages; Ex. 3, recorded Feb. 6, 1967, comprising 39 pages; Ex. 4, recorded June 1, 1967, comprising 15 pages; Ex. 5, recorded July 24, 1967, comprising 38 pages). Although the affidavits of respondent, in part, purport to incorporate and record copies of newspaper and magazine articles, correspondence, releases of legatees and documents relating in part to the Baker estate, they are replete with personal accusations by the respondent to the conduct of Surrogate Rogers and the members of the Goldstein firm who participated in the proceedings. The respondent's references to the conduct of Surrogate Rogers (*e. g.*, "The Surrogate apparently tried to intimidate the executor in putting in his case"; Ex. 4, at page 2: "The Surrogate's conduct of the trial was highly prejudicial and unfair to the executor," and " . . . removal of the Monroe County Surrogate would be appropriate" Ex. 2, at p. 8) can only be construed as clumsily veiled attempts to excuse his own conduct by undertaking to vilify the Surrogate without reason or justification. Other statements of the respondent throughout the papers filed in the Monroe County Clerk's Office accuse the members of the Goldstein

firm, contrary to fact, of filing "false and baseless objections" (Ex. 5, pp. 176 and 182), of exercising and displaying improper influence upon and control over the conduct of the Surrogate (Ex. 142-144) and other professional misconduct.

In a further statement filed in 1967 with a committee of the Monroe County Bar Association under the title "Surrogate's Court Reform" (Ex. 6), in the context of a paragraph discussing "crooked judges" in decedent's estates, respondent concluded that investigation "would show examples of worse abuses in Monroe County . . . " In the same statment respondent with obvious reference to the proceedings in the Henry A. Baker Estate, which he called the "Estate of Eli Z. Plunder", the respondent asserted that the Goldstein firm undertook "unconscionable exaction of more than the entire estate" with the approval of the Surrogate.

In the course of the present proceeding when faced with such statements, the respondent did not deny that his purpose in making such public recordings was, at least in part, to make it known that the settlement made by him in the Surrogate's Court was unjustified and improper (pp. 275, 293); to publicly assert that members of the Goldstein firm knowingly made false statements before the court and violated Canons of Professional Ethics (pp. 278, 281, 286, 287, 347) and that large sums of money were unjustifiably paid to clients of the Goldstein firm with the approval of the Surrogate (p. 308).

As we view the state of the law, the sole legal issue presented is whether the statements of respondent which might otherwise subject him to censure, suspension or removal from office, are expressions of opinion on public matters privileged and protected by the First Amendment.

The respondent sets forth a number of cases including *New York Times Company v. Sullivan*, 376 U. S. 254, *Garrison v. Louisiana*, 379 U. S. 64, *Rosenblatt v. Baer*, 383 U. S. 75, *Time, Inc. v. Hill*, 385 U. S. 374, *Pickering v. Board of Education*, 391 U. S. 563, among others, to support the propositions that reference to professional ethics is irrelevant since respondent has the right under the First Amendment to participate in debate of public issues including those pertaining to the courts; and that his comments in such debate are privileged even though they might include "vehement, caustic and sometimes unpleasantly sharp attacks on governmental and public officials." *New York Times Company v. Sullivan, supra*, at p. 270. Premised upon these general statements of principle, respondent asserts that the record fails to establish the "actual malice" which would remove his acts from the area of constitutional privilege.

Although we do not believe the law requires such a finding on the facts before us, our view of the evidence leads us to conclude that the statements made by the respondent concerning both the Surrogate and the Goldstein firm were in fact calculated falsehoods, made with knowledge of their falsity and with reckless disregard of the truth. Our review of the estate proceedings supports the conclusion that the respondent was interrupted in the course of the improper administration of an estate from which he was to benefit substantially, by the timely appearance of competent counsel who had the courage and progessional integrity to present the issues to a court. In turn, the Surrogate of that court treated the respondent as a litigant without special privilege and made it apparent that the court would apply to him the same rules of legal conduct applicable to anyone who assumed a position of trust in the administration of an estate, including, if called

upon to do so, a finding of impropriety on respondent's part even though he was an attorney of that court. Although he chose to act as his own counsel through the trial of the issues before the Surrogate, when it became apparent that the Surrogate might decide the issues against him at the close of that trial, respondent sought the aid of independent counsel, both of whom proposed and generally approved the settlement finally concluded. The exchange that resulted divested the respondent of a substantial sum, but as an attorney, and with the independent advice of other counsel, the alternatives had to be known to him to face the fact of an adverse determination that could only be premised upon a finding that respondent had violated his trust, or to settle the issue by satisfying those legatees who chose to contest the issue in the amount of their apparent loss. Although he chose the latter, his resentment of the attorneys who uncovered the facts, and the judge who held him to the fiduciary standards of conduct, is documented from the public record of his statements filed without reason in fact or law.

By happenstance, the trial of the issues in the Surrogate Court and the final settlement of the objectants occurred at a time of public debate concerning the administration of the courts and decedent's estates in particular. Such issues were discussed in local and national periodicals, by legislative representatives, candidates for public office, by judges and by laymen. The respondent had the unquestionable right to participate in that debate, to be critical of the courts and the administration of justice. But here, we are convinced by the record that the respondent attempted to use the public debate as a cover for an unjustified personal and malicious attack on the judge and counsel who refused to accommodate respondent's improper conduct as a fiduciary in this particular estate

proceeding. On the state of the record in the Surrogate's Court, and in view of the advice of his counsel and the fact of settlement in accordance with such advice, considering the nature of the specific charges of misconduct by respondent against the court and counsel which were directed to the proceedings *in that case*, we can only conclude that the respondent's statements were malicious in their intent and purpose, founded on personal resentment against those whom he sought to harm and made with reckless disregard for the falsity of his allegations. As we view the facts here the respondent had undertaken a personal vendetta and launched a personal campaign of vilification against a firm of attorneys and a judge who were performing their sworn duty, in one instance to present a client's cause before the courts, and in the other to make an objective adjudication of the issues presented to him even though one of the participants was a member of the bar.

We cannot conceive of a competent and orderly administration of justice that would permit the professional advocate, who had traditionally been considered an officer of the court, to participate in the compromise of an issue before a judge, knowingly forego his right to review both the issues in the case and the conduct of the judge before superior tribunals, and then publicly undertake a concerted series of false, malicious and personal attacks against the court and counsel for performing their duty in the case. We believe it is implicit in the majority opinion of the court in the *Pickering* case (cited by respondent) that such instances to speak on matters affecting the vital functions of our system:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering v. Board of Education*, 391 U. S. 568.)

The principles here at issue differ substantially from those in *Pickering*, where no specified rules were established for the conduct of the teacher in relation to his criticism of the acts of his ultimate employer, the Board of Education. Here the avenue to review of the conduct of court and counsel to which respondent addressed himself was rejected by him. In addition the standards of conduct violated by the respondent are clearly established by the Cannons of Professional Ethics and requirements for submission of grievances involving a judical officer through recognized and proper authority is specific.

The "balance of interests" of which the court spoke in *Pickering*, as it relates to the conduct of an attorney who conceives himself aggrieved by the conduct of a Judge has, we believe, long been established in this State by Canon 1 of the Canons of Professional Ethics:

> "1. The Duty of the Lawyer to the Courts
> It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme important. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. *Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected*" (Emphasis supplied.)

Although we find that the facts exhibit malice on the part of respondent within the intent and meaning of *New York Times Company v. Sullivan, supra*, we are of the opinion that such is not a necessary element of proof in this disciplinary proceeding. Lawyers are traditionally bound to expose corruption or wrongdoing on the part of a judge through proper authority, but must, nevertheless, render respect to the judicial officer before whom they try their cause (Canons 1 and 3, Canons of Professional Ethics), and they are subject to disciplinary proceedings for public attack on the motivation, integrity or incompetence of the courts undertaken outside the forum provided for such complaint. (*In re Sawyer*, 360 U. S. 622.)

What might otherwise be a constitutionally protected right to speak or publish is, we believe, limited by the lawyer's obligation to follow the ethical precepts he is sworn to uphold.

We conclude therefore (1) that the respondent was guilty of professional misconduct in violation of Canons 1 and 3 of the Canons of Professional Ethics in undertaking public, unjustified and malicious attacks upon the integrity of the Surrogate of Monroe County and without submitting his grievances, as he conceived them to be, to the proper authorities, and that his acts did thereby tend to prejudice public confidence in the administration of justice; (2) that the respondent was guilty of professional misconduct in that he wilfully, maliciously and knowlingly, without cause or provocation, did file and publish false statements which were intended to harm and villify the professional reputation of the members of the firm of Goldstein, Goldman, Kessler and Underberg.

Based upon the foregoing we recommend that the charges contained in the petition of the Bar Association of Monroe County verified the 15th day of April, 1968, be sustained.

The order directing this reference specifically excluded any recommendation as to the degree of discipline, if any, that should be imposed. Prior to trial of the issues the respondent authorized his counsel to offer and his counsel did read into the record a statement of apology (pp. 5 and 6). Since consideration of such matter was excluded from consideration by the order of reference, we respectfully call the attention of such statement to the court for its consideration under the circumstances.

Respectfully submitted,

ROBERT E. FISCHER,
Broome County Judge.

Dated: Binghamton, New York, March 6th, 1970.

APPENDIX B

Appellate Division Opinion

STATE OF NEW YORK

SUPREME COURT—APPELLATE DIVISION

In the Matter
of
BARTON BAKER,

Respondent,

MONROE COUNTY BAR ASSOCIATION,

Petitioner.

Per Curiam:

Respondent was admitted to the Bar by this court on September 27, 1923. The Monroe County Bar Association's petition alleges that in a Surrogate's court proceeding to settle the account of respondent as executor of a will, objections to his account were filed on behalf of the legatees by three law firms because of his failure to include therein 1000 shares of Eastman Kodak Company stock and a bank account. After a trial of the issues at which respondent claimed that the disputed items were given to him by the decedent and, after the matter had been fully heard by the Surrogate but before a decision was rendered, respondent settled the claims of objectors by payment of approximately $120,000 to the objecting legatees and their attorneys. Immediately thereafter he filed the first of five affidavits filed by him in Monroe County

Clerk's office and submitted a statement to the Constitutional Convention Committee of the Monroe County Bar Association which contained unwarranted and irresponsible attacks upon the integrity of the Surrogate and one of the law firms.

Respondent answered the petition admitting that the documents were recorded and presented by him and moved before us to dismiss the petition on the ground that his utterances were privileged and within his rights under the First and Fourteenth Amendments to the United States Constitution and Article 1, section 8 of the New York State Constitution. We denied the motion with leave to renew it in this court upon all the proof submitted at an evidentiary hearing and we appointed a Referee to take proof upon the issues raised by the petition and answer.

A transcript of the trial in Surrogate's court shows that in January 1962 respondent moved his 94 year old uncle from St. Louis to a sanitarium in Rochester. On January 18, 1962, the respondent transferred the uncle's $38,500 bank account to himself. On January 20, 1962, his uncle executed a will, drawn by respondent, naming respondent his executor and on the next day respondent arranged the transfer of 1,000 shares of his uncle's Eastman Kodak stock to himself. The evidence established the existence of a fiduciary relationship between respondent and the testator which cast a heavy burden upon respondent to show that the transfers were the voluntary, intelligent and competent acts of the testator (Bernard v. Ginity, 140 N. Y. 249, 256). The sanitarium physician testified that on January 20, 1962, testator was mal-nourished, had hardening of the arteries with resulting heart and cerebral manifestations, was confused, disoriented as to time, and had tremors in

his head and hands. Respondent's testimony in support of his claim that the stock and bank account were gifts to him by the testator was corroborated only by respondent's wife.

At the close of the evidence the Surrogate suggested to counsel that they discuss the possibility of a compromise with him on some day of the next week. He said "I will not compel any attorney to do so if the attorney does not wish to do so." He mentioned the amount involved as $300,000, the possibility of an appeal, and said he would be glad to discuss the matter with all of them.

Respondent employed a prominent and able attorney to represent him in reaching a settlement, who recommenced a settlement which respondent rejected. Respondent employed another attorney who also recommended settlement and did in fact consummate a settlement at respondent's direction. Respondent's attorney advised him that it was in his best interest to settle the matter before a decision was rendered by the Surrogate and recommended the settlement which, although then rejected, was ultimately consummated. The matter was then settled by the execution of the necessary documents by all the parties and respondent paid the settlement amount after which payment the objections were withdrawn. The attorney who represented respondent when the settlement agreement was signd testified that he had recommenced it. A similar statement as to the wisdom of the settlement had been made by his first attorney.

Respondent thereafter recorded the affidavits in Monroe County Clerk's Office on the respective dates of September 26, 1966, December 5, 1966, February 6, 1967, June 7, 1967,

and July 25, 1967. He testified that the reason for recording the first one was to base a claim for income tax deductions on it. This statement, being uncorroborated by any letters to or from the Internal Revenue Department, is entitled to little weight. His testimony on cross examination shows that four of the statements were in no way related to any tax question but were in fact intemperate and vicious attacks upon the Surrogate and the attorneys, as found by the Referee. He made no claim that such affidavits were recorded for any proper purpose although the last one recites, "This affidavit * * * should be useful in assisting in appropriate action as to the conduct of the attorneys for said group and further describes the participation of the Surrogate in encouraging said 'settlement,'". If respondent believed he had a legitimate complaint as to the conduct of the attorneys, he could have availed himself of the established procedure in the Appellate Division. (Judiciary Law, § 90). Adequate machinery is provided for charging the Surrogate with malfeasance or misfeasance in office. A Court on the Judiciary is the proper forum to explore fully any complaint against the Surrogate for misconduct (Constitution, Art. 6, § 22). Filing complaints in the County Clerk's office serves no purpose and the County Clerk's filing system was never intended for such use and the act of filing is proof of respondent's malice (*cf.* Matter of Manheimer, 113 App. Div. 136 Matter of Murray, 58 Hun. 664, opinion reported 33 NYSR #831; Matter of Rockmore, 127 App. Div. 499).

The affidavits contain many statements which respondent, having participated in the trial, knew to be false such as: "the objections are false and baseless", "the false statements of counsel amounted to libel", "counsel McNabb

filed false and baseless objections", "The surrogate's conduct of the trial was highly prejudicial and unfair to the executor", "The Surrogate apparently tried to intimidate the executor putting in his case", and "removal of the Monroe County Surrogate would be appropriate". In his further statement filed with a committee of the Monroe County Bar Association he referred to crooked judges and stated that an investigation would show examples of worse abuses in Monroe County and specifically referred to the Surrogate. Referring to his own case by the fictitious name of "E. Z. Plunder" he asserted that the law firm undertook unconscionable exaction of more than the entire estate with the approval of the Surrogate. The Referee found "the statements made by the respondent concerning both the Surrogate and the Goldstein firm were in fact calculated falsehoods, made with knowledge of their falsity and with reckless disregard of the truth". The Referee further found, "on the state of the record in the Surrogate's Court and in view of the advice of his counsel, and the fact of the settlement in accordance with such advice, concerning the nature of the specific charges of misconduct by respondent against the Court and counsel which were directed to the proceedings in that case, we can only conclude that the respondent's statements were malicious in their intent and purpose . . .". In our opinion the findings of the Referee are amply supported by the evidence.

New York Times Company v. Sullivan, 376 U. S. 254 holds that the constitutional guarantees of free speech prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless the statement was made with knowledge that it was false. In our opinion respondent knew that the defamatory statements made by him were false and, therefore, the rule

stated in the New York Times case has no application. Respondent was present and participated at the trial and had personal knowledge of what actually occurred there. His statements which differ from such occurrences are false and the falsity thereof is within his own observation and knowledge. This knowledge further confirms respondent's misconduct.

Respondent's statements accusing the Surrogate of prejudice, unfairness, permitting and approving unconscionable exaction from estates and attempted intimidation of respondent are more than an offense against the Surrogate as an individual. These baseless, contumacious charges are offenses against the dignity and integrity of the courts and our judicial system. "It may bring discredit upon the administration of justice amongst citizens who have no way of determining the truth of the charges. It tends to impair the respect and authority of the court. In this and in other jurisdictions, the rule is well settled that an attorney who engages in making false, scandalous or other improper attacks upon a judicial officer is subject to discipline." (Matter of Bevans, 225 App. Div. 427, 431.)

While the apology, which respondent's attorney read to the Referee with respondent's approval, should be considered (Matter of Greenfield, 24 A D 2d 651; Matter of Rockmore, 127 App. Div. 499) we must also consider his remarks before us in opposition to confirmation of the Referee's report reiterating his charges and referring to himself as the aggrieved party. By his remarks he reconfirmed his position that he was justified and indicated no good faith recantation of his improper conduct.

We deny respondent's renewed motion to dismiss the petition, confirm the Referee's report and his finding that respondent was guilty of professional misconduct in violation of Canons 1 and 3 of the Canons of Professional Ethics, and we further find that he violated Canon 29.

After weighing all the facts which must be considered in a disciplinary proceeding we concluded that respondent should be suspended for a period of six months and thereafter until further order of this court.

DelVecchio, J. P., Marsh, Witmer, Bastow, and Henry, JJ., concur.

APPENDIX C

Court of Appeals Opinion and Order

STATE OF NEW YORK

COURT OF APPEALS

In the Matter
of
BARTON BAKER, an Attorney,

Appellant.

MONROE COUNTY BAR ASSOCIATION,

Respondent.

The order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs, on the opinion at the Appellate Division. Insofar as the measure of discipline is concerned, "misconduct being proved, the (sanction) to follow was to be determined by the Appellate Division, and is not subject to revision here" (Matter of Axtell, 257 N. Y. 210, 211; see Matter of Kelly, 23 N. Y. 2d 368, 384; *cf.* Erie County Water Auth. v. Western N. Y. Water Co., 304 N. Y. 342, 346).

Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz.*: The appellant argued that his right to freedom of speech and his privileges and immunities under the First and Fourteenth Amendments were violated by the sanction imposed herein. This court held that appellant's constitutional rights were not violated.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-250

October Term, 1971

BARTON BAKER, an attorney,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

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BATAVIA TIMES, LAW PRINTERS,
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IN THE

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No. 71-250

October Term, 1971

BARTON BAKER, an attorney,

Petitioner,

v.

MONROE COUNTY BAR ASSOCIATION,

Respondent.

RESPONDENT'S BRIEF

Respondent, Monroe County Bar Association, respectfully prays that the Petition for a writ of certiorari be denied.

Statement

The material and relevant facts underlying this disciplinary proceeding and the evidence adduced at the hearing before the Referee have been extensively reviewed by the Referee in his report annexed to the Petition as Appendix A and by the Appellate Division in the opinion annexed to the Petition as Appendix B. No further discussion appears to be necessary, except to clarify some possible wrong impressions which might result from statements contained in the Petition.

Petitioner in his "Statement" places great emphasis on the alleged discrepancy between the amount of the disputed transfers and the amount of the settlement. On the basis of the value of One Thousand (1,000) shares of Eastman Kodak stock at One Hundred Four Thousand Dollars ($104,000.00) at the time of transfer (Page 4), he computes the total disputed transfers as not more than One Hundred Sixty Thousand Dollars ($160,000.00) (Page 5). He therefore characterizes as a "widely exaggerated figure" the Surrogate's statement that upwards of Three Hundred Thousand Dollars ($300,000.00) was involved (Page 5).

Petitioner appears to overlook the fact that between the time of transfer in 1962 and the settlement in 1966 the value of One Thousand (1,000) shares of Eastman Kodak stock had increased (Appendix A—Page 11).

Petitioner also emphasizes that the objectants received the entire amount of the settlement although they were entitled to no more than 4/15 thereof (Page 5).

Petitioner appears to ignore the fact that the amount of settlement, to wit approximately Seventy-five Thousand Dollars ($75,000.00), represented only 4/15 of the value of the disputed transfers at the time of settlement. The objecting parties therefore only received their proportionate share of the total amount in dispute. The additional sum of Forty-six Thousand Dollars ($46,000.00) were attorneys fees which customarily would have had to be paid by the executor if he had been surcharged after trial.

Petitioner also states that his statement as to his reason for making the statements under attack was nowhere impeached (Page 8). The Referee found that Petitioner's

statements, were "filed without reason in fact or law" (Appendix A—Page 18).

Aside from these references to the facts, Respondent respectfully submits that Petitioner is not protected by a constitutional right of free speech under the First and Fourteenth Amendments to the United States Constitution.

POINT I

The constitutional protection of free speech is not necessarily available to an attorney as a defense in a disciplinary proceeding.

The cases cited by Petitioner, to wit *N. Y. Times v. Sullivan*, 376 U. S. 254, 279-280; *Garrison v. Louisiana*, 379 U. S. 64; *Beckley v. Hanks*, 389 U. S. 81; *Pickering v. Board*, 391 U. S. 563; *Puentes v. Board*, 392 U. S. 1341 reversing 18 N. Y. 2d 906, see 24 N. Y. 2d 996, have no application to a disciplinary proceeding against an attorney. Only Pickering and Puentes involve disciplinary proceedings, but they deal with teachers.

The distinction clearly is in the availability of review procedures and the standard of conduct established by the Canons of Ethics for attorneys, and the absence thereof for teachers (Appendix A—Pages 19 and 20).

The right to free speech is not unlimited and absolute (*Schenk vs. United States*, 249 U. S. 47, 52).

A lawyer, taking the oath of office and subscribing to the Canons of Professional Ethics, voluntarily limits his right of free speech. He agrees to submit his grievances to proper authority, but not otherwise (Canons of Professional Ethics, Canon 1).

POINT II

Malice found as a fact deprives Petitioner of the constitutional protection if otherwise available.

This Court has defined malice, so as to overcome the defense of constitutionally protected free speech as the making of a statement with knowledge of its falsity or with reckless disregard of whether it was true or false (N. Y. Times Company v. Sullivan, 376 U. S. 254) or making a false publication with a "high degree of awareness of probable falsity" (Garrison vs. Louisiana, 369 U. S. 64/74).

The existence or absence of malice is to be determined by the finder of fact (Amont vs. Thompson, 390 U. S. 727/732).

Both the Referee and the Appellate Division have found as a matter of fact that the Petitioner was prompted by malice (Appendix A and B). By its affirmance, the Court of Appeals agreed (Appendix C).

Conclusion

For the foregoing reasons the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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